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has recognized that it may exist in certain cases.<sup>23</sup> Aside from treaties and congressional legislation, the principal factor in determining this right is the title by which the Indians hold their reservations, and this matter of title is the foundation of the wards-of-the-State theory, above referred to. Where Indians come into a State and acquire their lands by purchase from private individuals, as the Tonawandas have done in New York,<sup>24</sup> the State should have as much control over them as it would have over a colony of Europeans in similar circumstances, assuming, of course, that Congress has not exercised its right to legislate to the contrary. On the other hand, where Indians occupy lands the ultimate title to which is in the federal government, it is settled that no State which, subsequently, may be created around those lands has any right over them in the absence of express treaties or congressional legislation to that effect.<sup>25</sup> But where, as in some of the older States, the Indians occupy lands the ultimate title to which is in a State, such State should be at liberty to exercise all control over these its lands<sup>26</sup> which is not inconsistent with treaties and congressional legislation concerning those Indians.<sup>27</sup>

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OPERATION OF RAILROAD AS A NUISANCE.—In England, the power of Parliament to legalize nuisance is unlimited,<sup>1</sup> but in this country, such legislation is usually unconstitutional, because falling within the prohibition against depriving a person of his property without due process of law, or against taking private property for public use without just compensation.<sup>2</sup> Some courts, however, have declared that it is a matter of degree, and that the legislature may authorize small nuisances without compensation, but not large ones;<sup>3</sup> while others, appreciating the difficulty of drawing the line, conclude that the legislature has power to legalize all nuisances.<sup>4</sup> In determining whether the legislature could authorize nuisance incident to the ordinary operation of a railroad carried on in a prudent and careful manner, the courts made an arbitrary distinction between physical taking, and mere annoyance or inconvenience.<sup>5</sup> No action lay, even at common law, against a

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<sup>23</sup>New York v. Dibble (1858) 21 How. 366; see opinion of McLean, J., in Worcester v. Georgia, *supra*, pp. 588-590 and 594; United States v. Kagama, *supra*, p. 383; The Kansas Indians, *supra*, p. 752. The States have at times even had the tacit consent of the federal government in making treaties with the Indians. See Seneca Nation v. Christie, *supra*.

<sup>24</sup>See Hatch v. Luckman, *supra*.

<sup>25</sup>The Kansas Indians, *supra*; Donnelly v. United States (1913) 228 U. S. 243, 271.

<sup>26</sup>Peters v. Tallchief, *supra*; Hatch v. Luckman, *supra*; Silverheels v. Maybee (N. Y. 1913) 82 Misc. 48.

<sup>27</sup>Fellows v. Blacksmith (1856) 19 How. 366; The New York Indians, *supra*.

<sup>1</sup>Burdick, Torts (3rd ed.) 52.

<sup>2</sup>U. S. Const., Amendments 5 & 14.

<sup>3</sup>Sawyer v. Davis (1884) 136 Mass. 239. In Penn. R. R. v. Marchant (1888) 119 Pa. 541, recovery for damages sustained by the operation of the road, was refused. This was largely based on the peculiar wording of the Pennsylvania constitutional provision.

<sup>4</sup>See Beseman v. Penn. R. R. (1888) 50 N. J. L. 235.

<sup>5</sup>Austin v. Augusta Terminal Ry. (1899) 108 Ga. 671.

railroad company for damages unavoidably resulting to abutting owners only, from noises, smoke, and jarring, caused by the proper operations of its railroad.<sup>6</sup> Where the disturbance is such as would in the absence of legislative authority have constituted an actionable nuisance, however, the existence of such authority does not take away from the property owners their right to redress.<sup>7</sup>

Constitutional amendments in many States, apparently adopted to avoid the harsh results reached in decisions following the above rule, provide that compensation must be paid for damaging and destroying, as well as for taking, private property for public use. But even in the face of constitutional provisions, the great weight of authority applies the same rule so far as the operation of a railroad at and between stations is concerned.<sup>8</sup> These decisions are due to a reluctance to make the roads general tortfeasors, and thus, by making operation practically impossible, to deprive the public of the enormous benefits of their maintenance. The word "damaged", in the constitutional provision, does not give a right of action in a case where the injuries would have been *damnum absque injuria* in an action against the railroad before the adoption of the provision, but only makes the railroad liable to the same extent as it would have been at common law. An owner of property, therefore, none of which is taken, and who is merely inconvenienced and annoyed in common with the general public, cannot recover compensation, although his property has depreciated in market value and he suffers greater in degree than those about him.

In deciding the case of *Matthias v. Minneapolis, St. Paul & Sault Ste. Marie Ry.* (Minn. 1914) 146 N. W. 353, the court points out a distinction that is almost invariably recognized. In the location of yards, terminals, shops, and engine houses, the railroad company acts in its private capacity and not as an agent of the government, and since it is true that the railway has a wide field of choice, the courts are less inclined to relieve it from the consequences of operating such facilities than where the damages are from the mere operation of the road over a route which the legislature compels the railway to follow.<sup>9</sup> In New York, this distinction is usually observed, but in the case of *Hearst v. New York Central & Hudson River R. R.* (App. Div., 1st Dept. 1914) 148 N. Y. Supp. 586, relief was refused to the plaintiff on the ground that the terminal operations were not carried on unreasonably or negligently, apparently proceeding on the theory that if such facilities are properly located and properly managed there should be no recovery for the annoyance caused thereby.<sup>10</sup>

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<sup>6</sup>See *Chicago, M. & St. P. Ry. v. Darke* (1893) 148 Ill. 226.

<sup>7</sup>See *Chicago, M. & St. P. Ry. v. Darke*, *supra*. In *Adams v. Chicago B. & N. R. R.* (1888) 39 Minn. 286, the court allowed damages to the plaintiff, an abutting owner of property, for the ordinary operation of the railroad carried on in a lawful and careful manner, on the ground that he had an easement in the street to the full width thereof for the admission of light and air, and that this easement was interfered with by the operation of the railroad.

<sup>8</sup>*Illinois Central R. R. v. Trustees of Schools* (1904) 212 Ill. 406; *Austin v. Augusta Terminal Ry.*, *supra*.

<sup>9</sup>*Baltimore & P. R. R. v. Fifth Baptist Church* (1883) 108 U. S. 317; *Cogswell v. New York, N. H. & H. R. R.* (1886) 103 N. Y. 10; see *Louisville Ry. v. Foster* (1900) 108 Ky. 743; *Wylie v. Elwood* (1890) 134 Ill. 281; *Terminal Co. v. Lellyett* (1904) 114 Tenn. 368.

<sup>10</sup>See *Dolan v. Chicago, M. & St. P. R. R.* (1903) 118 Wis. 362; see *Georgia, etc. Co. v. Maddox* (1902) 116 Ga. 64. The court in this case

Why, indeed, should there be any distinction made between the operation of a railway at and between stations and the operation of such facilities as terminal yards, whether properly located or not? Statutes conferring the power of eminent domain upon public service corporations were designed primarily for the welfare of the public, but they are in derogation of the common law and should be strictly construed. The mistake of looking solely to the convenience of the general public is obvious, and if, by the operation of the road or its facilities, land value is diminished, the owner should be allowed, especially under the newly adopted constitutional amendments, to recover the difference in value immediately before and immediately after the construction and operation of the road or its facilities as the case may be.<sup>11</sup>

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CIVIL STATUS OF CONVICTS.—At early common law, a person convicted and sentenced for treason or other felony was placed, by operation of law, in a state of attainder.<sup>1</sup> Three important incidents were consequent upon such attainder: first, forfeiture, whereby all the felon's property, both real and personal, was forfeited to the Crown; second, corruption of blood, whereby the attainted person lost the capacity to inherit and the power to transmit his estate to his heirs; and third, the incident commonly termed civil death, which consisted in a substantially complete extinction of the felon's civil rights.<sup>2</sup> In England, this barbarous doctrine of attainder, forfeiture, and corruption of blood, has now been entirely abolished by statute, with the single exception of forfeiture consequent upon outlawry, and provision is made for the administration by trustees of the convict's estate, for the benefit of his creditors and the support of his family.<sup>3</sup>

These forfeitures and disabilities which the ancient common law imposed upon convicted felons have never, in their entirety, attained legal recognition in this country, principally because they are out of harmony with the spirit of our fundamental laws and system of gov-

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fails utterly to consider that the plaintiff might have been damaged irrespective of the amount of care used by the defendant. In *Taylor v. Seaboard Air Line Ry.* (1907) 145 N. C. 400, the court seems unduly influenced by the fact that the railroads are "our great arteries of commerce", and rules the complaint to be insufficient in law on the ground that it failed to allege that the railway needlessly did the act complained of. In *Romer v. St. Paul City Ry.* (1899) 75 Minn. 211, it was ruled that there was in fact no nuisance; it is submitted that on the facts this finding was obviously incorrect. See *Wylie v. Elwood*, *supra*.

<sup>11</sup>See the dissenting opinion in *Austin v. Augusta Terminal Ry. Co.*, *supra*; *Chicago R. I. & P. Ry. v. O'Neill* (1899) 58 Neb. 239; *Omaha & N. P. R. R. v. Janecek* (1890) 30 Neb. 276; *Louisville S. R. R. v. Hooe* (1898) 20 Ky. L. 849.

<sup>1</sup>Co. Lit. 130a, 133a; 1 Bl., Comm. \*132, \*133; 4 Bl., Comm. \*336, \*380.

<sup>2</sup>1 Chitty, Criminal Law, \*723 *et seq.*; 2 Bl., Comm. \*251, \*252; 4 Broom & H., Comm. 487 *et seq.*; Co. Lit. 130a; see *Bannyster v. Trussel* (1597) Cro. Eliz. 516.

<sup>3</sup>Act, 33 & 34 Vict., c. 23. This statute supplements Act, 54 Geo. III, c. 45, under which forfeiture of lands and corruption of blood was abolished in every case of felony, except treason, petit treason and murder.